Supreme Court, U.S.
FILED
95 29 JUL 3 1995
OFFICE OF THE CLERK

No._____

In the

SUPREME COURT OF THE UNITED STATES

October Term 1995

DAVID B. JACOBS, Esq.,

Petitioner.

v.

ROBERT P. GUIDO, FRANK A. FINNERTY, JR., GRIEVANCE COMMITTEE FOR THE TENTH JUDICIAL DISTRICT, MOSES WEINSTEIN, PATRICIA WARMHOLD, DOMINICK PELLE, GUY JAMES MANGANO, JR., WILLIAM C. THOMPSON, LAWRENCE J. BRACKEN, THOMAS R. SULLIVAN, SONDRA MILLER, and the STATE OF NEW YORK,

Respondents.

Petition for a Writ of Certiorari to the Second Circuit Court of Appeals

PETITION FOR A WRIT OF CERTIORARI

David B. Jacobs
145D Street, Apt. 1D
Freeport, New York 11520
Tele: 516 868-4591

QUESTIONS PRESENTED

1. Whether the federal district court had subject matter jurisdiction to hear and determine issues of a lower state court's decision and order which it is claimed lacked the subject matter jurisdiction to determine the issues decided therein?

2. Whether the federal district court had subject matter jurisdiction to enjoin continued enforcement of order and decision of a lower state court that is claimed to be void because the lower state court lacked the subject matter jurisdiction to determine the issues decided therein

3. Whether the order and decision appealed from should be reversed and the complaint reinstated, or whether, in the alternative, the question of the subject matter jurisdction of the Appellate Division, Second Department of the State of New York to evaluate and set a value of an attorney's fee within the construct of a Grievance Committee proceeding should be certified to the State or Federal Court?

PARTIES

The names of all parties to this proceeding in the court whose judgment is sought to be reviewed here appear in the caption of the case.

TABLE OF CONTENTS

Page

OPINIONS BELOW....2

JURISDICTIONAL STATEMENT....3

CONSTITUTIONAL, STATUTORY AND COURT RULES INVOLVED....4

STATEMENT OF THE CASE....4

STATEMENT OF FACTS....5

REASONS FOR GRANTING THE WRIT....8

PRIOR COURT PROCEEDINGS....9

THE FEDERAL COURTS HAVE THE POWER TO REVIEW STATE COURT DISCIPLINARY PROCEEDING AND DECISIONS....14

THE PETITIONER MADE ALLEGATIONS IN HIS COMPLAINT THAT RAISED ISSUES OF FEDERAL QUESTION JURISDICTION....17

CONCLUSION....28

APPENDIX:

Order of the Second Circuit Court of Appeals affirming the Federal District Court Order

dismissing the Petitioner's Complaint
dated April 5, 1995.....A-1

Order of the Federal District Court Order
dismissing the Petitioner's Complaint
dated August 22, 1994.....A-1

Order of the AppellateDivision of the New York
Supreme Court for the Second Department directing
the petitioner to vacate the judgments entered against
his client; suspending the petitioner from the practice
of law for a period of three years; requiring compliance
with 22 NYCRR 691.10, and N.Y. Judiciary Law § 90
dated March 13, 1993.....A-8

Order of the Appellate Division of the New York
Supreme Court for the Second Department denying
the petitioner's motion for reargument
dated May 17, 1993.....A-14

Order of the Court of Appeals of the State of New
York denying the petitioner's motion for leave to
appeal the Order and Decision of the Appellate
Division of the New York suspending the petitioner
from the practice of law for a period of three years;
requiring compliance with 22 NYCRR 691.10, and
N.Y. Judiciary Law § 90 dated July 9, 1991.....A-15

Order of the Appellate Division of the New York
Supreme Court for the Second Department denying
the petitioner's motion to refer this matter to the
arbitration panel of the Nassau County Bar
Association to arbitrate the fee dispute in question;
or in the alternative, (c) directing that the Justice

assigned to the matrimonial case in question conduct a hearing to confirm the attorney's fees, and (d) staying the disciplinary proceeding pending the proposed hearing in the Supreme Court, Nassau County for reargument dated May 10, 1991.....A-16

Order of the Appellate Division of the New York Supreme Court for the Second Department denying the petitioner's motion to obtain a bill of particulars, conduct an examination before trial and discovery; from the complainant dated August 28, 1991.....A-18

Order of the Appellate Division of the New York Supreme Court for the Second Department denying the petitioner's motion to holding in contempt Dominick Pelle, Esq., the attorney who represented the husband in the matrimonial action from which the charges of misconduct against the respondent emanated; (2) reopening the disciplinary proceeding against the respondent to receive evidence related to the subpoenaed information; (3) directing Dominick Pelle, Esq. to appear with the relevant records at the office of the Grievance Committee pursuant to the subpoenas duly served upon him for the purpose of giving evidence in the disciplinary proceeding against the respondent; and (4) staying all proceedings pending receipt of the proposed information dated March 20, 1992.....A-20

Order of the Appellate Division of the New York Supreme Court for the Second Department granting the Grievance Committee for the Tenth Judicial District pursuant to statute Judiciary Law, § 90[7]) leave to institute and prosecute a disciplinary proceeding in this Court as petitioner against David Barnett Jacobs dated July 17, 1990.....A-22

Fifth, Sixth, Eighth and Fourteenth Amendments
to the United States Constitution.....A-24

Provisions of the Constitution of the
State of New York.....A-25

New York Judiciary Law § 90.....A-26

TABLE OF AUTHORITIES

Cases

Ackerman v. Ackerman, 14 Abb. Prac. 229 (1862
Adams v. Stevens & Cagger, 26 Wend. 451
Allied Structural Steel v. Spannaus, 438 U.S. 234, 244
Andrus v. Mcauley, D.C. Wash., 21 F. Supp. 70
Application of Linder, D.C., 16 F. Supp. 605
Boyce Motor Lines, Inc. v. United States, 342 U.S. 337 at 340 (1952)
Brookley v. Ives, 243 A.D. 487, 278 N.Y.S. 147
Cair v. Peck, 6 N.Y.2d 97, 188 N.Y.S.2d 491
Calder v. Bull 3 Dall. 386 (1798)
Collins v. Miller, 252 U.S. 364, 370 (1920
Commonwealth ex rel. Wall v. Smith 345 Pa. 512, 29 A.D.2d 912, 913
Connally v. General Construction Co., 269 U.S. 385 at 391(1926)
District of Columbia Court of Appeals v. Feldman, 460 U.S. 462, 486 (1983)
Doey v. Clarence P. Howland Co., 224 N.Y. 30, 120 N.E. 53, cert. den. 248 U.S. 574, 63 L.Ed 4
28. 39 S.Ct. 11
Erdmann v. Stevens, 458 F.2d 1205
Everitt v. Mitchell, 202 N.Y.S. 260
Ex parte Flora, Ohio App., 31 N.E.2d 482, 485
Ex Parte Garland, 4 Wall. 333 (1867)
Fuentes v. Shevin, 407 U.S. 67 (1972
Getty v. Reed, 547 F.2d 971
Goldberg v. Kelly, 397 U.S. 254 (1970

Goss v. Lopez, 419 U.S. 565 (1975

Green v. McElroy, 360 U.S. 474 (1959)

Greenberg v. Jerome H. Remick & Co., 129 N.E. 211,
230 N.Y. 70, reversing judgment 181 N.Y.S. 987, 191 A.D. 947

Houston v. Moore, 3 Wheat. 433, 434 (1818

Hurtado v. California, 110 U.S. 516 (1884

In Re Britton's Will, 60 N.Y.S.2d 466, at 474

In re Pye, 21 A.D. 206

In re Ruffalo, 390 U.S. 544, 551

In re Tinkoff, 101 F.2d 341

In re Yagman, 796 F.2d 1165, 1182-3 (9th Cir. 1986)

In Wilkins v. Carmichael 1 Doug. 101

Kamp v. Kamp, 59 N.Y. 212

Kaplan v. Reuss, 495 N.Y.S.2d 404, 113 A.D.2d 184, affd 506
N.Y.S.2d 304, 68 N.Y.2d 693

Losey v. Stanley, 147 N.Y. 560, 42 N.E.8

Lynn v. Agnew, 179 A.D. 305,166 N.Y.S. 274, judgment affirmed

Lynn v. McCann, 123 N.E. 877, 226 N.Y. 654

MacAffer v. Boston & M.R. Co., 268 N.Y. 400, 197 N.E. 328

Machcinski v. Lehigh Valley R. Co., 2 Cir., 272 F. 920

Matter of Anderson's Estate, 136 Misc. 110, 240 N.Y.S 532

Matter of Goldin v. Duncan, 216 A.D. 472, 215 N.Y.S. 445

Matter of Gordon, 640 F.2d 1143

Matter of Kentana, 170 Misc. 663

Matter of Lake's Estate 219 A.D. 530, 220 N.Y.S. 323

Peterson v. Ocean Electric R. Co., 161 A.D. 720, 146 N.Y.S. 604,
affd 214 N.Y. 43, 108 N.E. 199

Matter of Pieria, 82 A.D. 466, 81 N.Y.S. 927, aff'd. 176 N.Y. 566,
68 N.E. 1123

Matter of Podell, 138 Misc. 6, 245 N.Y.S. 28
Matter of Popek's Estate, 157 Misc. 421, 283 N.Y.S. 758
Matter of Post's Estate, 155 Misc. 389, 279 N.Y.S. 408
Matter of Potts, 123 Misc. 346, aff'd.,213 A.D. 59, aff'd.. 241 N.Y. 593 (1925)
Matter of Rosenblum, 503 N.Y.S.2d 605, 121 A.D.2d 546
Matter of Smith, 111 A.D. 23, 97 N.Y.S. 171
Matter of Thalheim, 853 F.2d 383 (5th Cir, 1988)
Mattox v. United States, 157 U.S. 237, 535, 536, (1895)
Mildner v. Gulotta, 405 F. Supp. 182 (DCNY, 1985)
Perry v. Sinderman, 408 U.S. 593 (1972)
Risley v. Phenix Bank, 83 N.Y. 318 aff'd. 111 U.S. 125, 28 L.Ed. 374, 4 S.Ct. 22

Roadway Express v. Piper, 447 U.S. 752, 764, 100 S.Ct. 2455
San Diego Gas & Elec. Co. v. San Diego, 450 U.S. 621,632-33 (1981)
Sexton v. Arkansas Supreme Ct., Committee on Professional Conduct, 730 F. Supp. 285
Sniadach v. Family Finance Corp. et al., 395 U.S. 337 (1969)
Spencer v. Bush, 98 N.Y.S. 690
Steele v. Hammond, 121 N.Y.S. 589, 136 App. Div. 667
Stevens & Cagger v. Adams, 23 Wend. 57,
aff'd. Adams v. Stevens & Cagger, 26 Wend. 451
U.S. v. Gradwell, 243 U.S. 476, 485 (1917)
U.S. v. Hudson, 11 U.S. 32 (7 Cranch, 1812).
Waldo v. Schmidt, 200 N.Y. 199, 93 N.E. 477
Washington v. Texas, 388 U.S. 14 at p. 19, 1967
Werner v. Knowlton, 94 N.Y.S. 1054, 107 A.D. 158

Whitney v. California, 274 U.S. 357, 360 (1927).

Constitutional Provisions and Statutes

Constitution of the United States
5th, 6th 8th and14th
Constitution of the State of New York 1894 Art. VI §§ 1, 2, 4k
Constitution of the State of New York
Art. 1 § 2, Article 6 §§28(c), 30

28 U.S.C. §2283
42 U.S.C. § 1983

1848 N.Y. Laws, ch. 379
1876 N.Y. Laws, ch. 448
N.Y.S. Judiciary Law, §§83, 90(2), 474, 475, 479, 484, 486
22 N.Y.C.R.R. §80.3(a)(5), 80.3(c)

Appellate Division of the Supreme Court
Second Department Appellate Court Rules
Part 691 and § 601.10 thereof

No._____

In the

SUPREME COURT OF THE UNITED STATES

October Term 1995

DAVID B. JACOBS, Esq.,

Petitioner.

v.

ROBERT P. GUIDO, FRANK A. FINNERTY, JR., GRIEVANCE COMMITTEE FOR THE TENTH JUDICIAL DISTRICT, MOSES WEINSTEIN, PATRICIA WARMHOLD, DOMINICK PELLE, GUY JAMES MANGANO, JR., WILLIAM C. THOMPSON, LAWRENCE J. BRACKEN, THOMAS R. SULLIVAN, SONDRA MILLER, and the STATE OF NEW YORK,

Respondents.

Petition for a Writ of Certiorari to the Second Circuit Court of Appeals

PETITION FOR A WRIT OF CERTIORARI

Petitioner, David B. Jacobs, respectfully petitions for a writ of certiorari to review the Decision, final Order and Judgment of the Court of Appeals for the Second Circuit and/or to certify the question of the subject matter jurisdiction of the Appellate Division of the Supreme Court of the State of New York to evaluate the nature and extent of an attorney's fee with the construct of a Grievance Committee disciplinary proceeding.

OPINIONS BELOW

The Decision, final Order and Judgment of the Court of Appeals for the Second Circuit affirming the decision of the Federal District Court For the Eastern District of New York appears at A-1. The decision of the Federal District Court For the Eastern District of New York dismissing the petitioner's complaint appears at A-6 . The final Order and Judgment of the Appellate Division of the Supreme Court of the State of New York, Second Department, inter alia, suspending the petitioner from the practice of Law at A-8. The final Order and Judgment of the Appellate Division of the Supreme Court of the State of New York, Second Department denying the petitioner's motion to reargue, denying the petitioner leave to appeal to the Court of Appeals of the State of New York and directing the petitioner to vacate two confessions of judgment of record appears at A-14. The Order of the Court of Appeals of the State of New York denying the petitioner leave to appeal to the Court of Appeals of the State of New York appears at A-15. The final Order and Judgment of the Appellate Division of the Supreme Court of the State of New York, Second Department denying the petitioner the opportunity to have an arbitration on the issue of the nature and extent of his earned attorney's fee appears at A-16. The final Order and Judgment of the Appellate Division of the Supreme Court of the State of New York, Second Department denying the petitioner the opportunity to (1) conduct an examination before trial of the complainant, Patricia Warmhold; (2) to obtain a bill of particulars from the complainant, Patricia Warmhold; (3) to obtain

complete disclosure of all relevant and material information in the possession of the complainant and/or Grievance Committee for the Tenth Judicial District; and (4) for an order directing that all further proceedings be stayed pending the determination of the instant motion, and if granted, for a stay pending completion of discovery appears at A-18. The final Order of the Appellate Division of the Supreme Court of the State of New York, Second Department denying petitioner's application to reopen the Grievance Committee hearing and to obtain the office records of Dominick Pelle appears at A-20. The final Order of the Appellate Division of the Supreme Court of the State of New York, Second Department authorizing the Grievance Committee to institute and prosecute a disciplinary proceeding appears at A-22.

JURISDICTIONAL STATEMENT

The Second Circuit Court of Appeals' Opinion in this matter was filed on April 5, 1995. This Court's jurisdiction is invoked under Title 28, U.S.C. § 1254 (1-3). This Court's jurisdiction is also invoked under Title 28, U.S.C. § 1257 (a) (1988) because the Judgment of the Appellate Division, Second Department of the State of New York sought to be reviewed and/or collaterally attacked, of necessity, draws into question the validity subject matter jurisdiction of the Appellate Division, Second Department of the State of New York and/or the application of §90 of the Judiciary Law of the State of New York on the grounds that it is repugnant to the Constitution of the United States.

As required by Rule 29.4(c) of this Court, Petitioner states that Title 28 U.S.C. § 2403 (b) (1988) may be applicable because this proceeding draws into question the constitutionality of a State statute.

CONSTITUTIONAL, STATUTORY AND COURT RULES INVOLVED

The constitutional, statutory and court rule provisions relied upon by the petitioner are the Fifth, Sixth, Eighth, and Fourteenth Amendments to the U.S. Constitution; Title 28 U.S.C. § 2283; 42 U.S.C. §§ 1983; Article VI , §§1,2, 4k of the Constitution of the State of New York of 1894; Article I , §§1,2, and Article VI, §§ 28(c) and 30 of the Constitution of the State of New York; 1848 New York Laws ch. 379,448; New York State Judiciary Law §§ 83, 90(2), and Part 691.10 of the Rules of the Appellate Division of the
Supreme Court of the State of New York.

STATEMENT OF THE CASE

This appeal arises out of the Order and Judgment of the Second Circuit Court of Appeals, [A-1] which affirmed the Order of Federal Judge Thomas C. Platt of the U.S. District Court For the Eastern District of New York [A-6]. Judge Platt dismissed the Petitioner's complaint, and denied the Petitioner an injunction from his suspension from the practice of law in the New York State Courts for a period of three years.

Jurisdiction of the Federal Court for the Eastern District of New York was based on the existence of a Federal Question, alleged violations of the Petitioner's a) civil rights pursuant to 42 U.S.C. §1983, b) U.S. Constitutional rights under the 5th, 6th, 8th and 14th Amendments and c) New York State Constitutional rights to a jury trial. Suit was initiated in the Federal District Court and not brought directly to this Court because a) leave to appeal to the highest court of Petitioner's state was denied, and the issue of the subject matter jurisdiction of the Appellate Division, Second Department of the State of New York to evaluate and set a value of an attorney's fee within the construct of a Grievance Committee proceeding, though raised by the Petitioner in the State Courts was

appeal and to collaterally attack the lower court Orders and judgments to this Court are that the Second Circuit Court of Appeals and the Federal District Court below erred in dismissing the Petitioner's complaint for want of subject matter jurisdiction.

The action in the Federal District Court was commenced on August 9, 1993 by filing a summons and complaint with the Clerk of the Court. An amended complaint was subsequently filed and served on August 16, 1993. In November 1993 the Petitioner filed an Order to Show Cause to obtain, among other relief, a temporary restraining Order and Injunction seeking to restrain anyone from enforcing the decision of the Appellate Division, Second Department of the Supreme Court of the State of New York which suspended the Appellant from the practice of Law pending the outcome of the instant suit. The Appellant then discontinued against Defendants, Dominick Pelle and David Pelle. The Respondents except for Patricia Warmhold, then moved to dismiss the Petitioner's complaint. The Petitioner cross-moved for summary judgment.

On January 11, 1994, the Petitioner filed a Petition for a Writ of Habeas Corpus. It was "stamped in" by the Clerk of the Court, but no action has been taken to date.

The Federal District Court, through Judge Thomas C. Platt, first denied the Petitioner's application for a temporary restraining Order, and then granted the Respondents' motion to dismiss the complaint and denied the Petitioner's cross-motion, and the Appellant initiated the appeal to the Second Circuit Court of Appeals. The Second Circuit Court of Appeals affirmed the District Court's dismissal and the Petitioner now comes to this Court.

STATEMENT OF FACTS

The underlying state disciplinary proceeding arose out of a complaint by Patricia Warmhold (the complainant) to the Grievance Committee for the Tenth Judicial District of the Appellate Division of the New York State Supreme Court, Second Department (state

grievance committee). Jacobs (the Petitioner herein) had represented Warmhold from 1987 and 1989 in multiple family court proceedings and a divorce proceeding in the Supreme Court of the State of New York, Nassau County.

Twice during their attorney-client relationship, the Jacobs had been fired by the Warmhold. Twice during their attorney-client relationship, the Jacobs in good faith allowed himself to be rehired to continue to perform legal services for the complainant. At no time to date has Jacobs receive payment for any of the legal services performed for the complainant. To secure the Jacobs' legal fees already earned and agreed upon by Warmhold, each time Jacobs was rehired, Warmhold and Jacobs entered into a mutual agreement for the payment of legal fees already earned by the Jacobs by executing a promissory note and a confession of judgment for Jacobs' attorney fee. Each was discussed, reviewed and then signed, notarized and acknowledged by the Warmhold, one in 1987 and another in 1988. After approximately three years of providing legal services to the Warmhold, and almost a year and a half after the second confession of judgment was negotiated and filed in the Nassau County Clerk's Office, the Petitioner obtained an Order of Withdrawal from both the matrimonial action and the Family Court proceedings. Only then did the Warmhold complain to the Grievance Committee. To date the complainant has never testified that the fee charged was excessive or unreasonable. The only claim Warmhold has made to date is that the Jacobs did not inform her that she, herself, was responsible for paying the legal fee for either the matrimonial or the family court proceedings.

The state grievance committee initiated an investigation and deposed Jacobs in November 1989. Based on its investigation, the committee charged that (1) Jacobs had overbilled Warmhold on two occasions, (2) he had wrongfully obtained from her and filed in the Office of the Nassau County Clerk two confessions of judgment and (3) he had improperly attempted to limit his own malpractice liability. The committee then brought a petition against Jacobs to

the Appellate Division. In May 1991, the Appellate Division appointed a special referee to hear evidence and make a report. The referee held five hearings from June to November 1991, at which Mrs. Warmhold was the only witness called by the state grievance committee. Jacobs testified in his own behalf and called only one other witness.

In June 1992, the referee sustained the charges of misconduct against Jacobs. The state grievance committee then petitioned the Appellate Division to confirm the report of the referee. In an Opinion and Order dated March 8, 1993, and reported at 188 A.D.2d 228, the Appellate Division confirmed the report and suspended Jacobs from practicing law for a three-year period commencing April 12, 1993. In imposing this sanction, the court took into consideration three prior disciplinary actions it had taken against Jacobs, two in 1986 and one in 1990. The court further ordered that Jacobs vacate the confessions of judgment against Warmhold. Jacobs' application for permission to appeal to the New York State Court of Appeals was denied. 82 N.Y.2d 681 (1993).

The petitioner contends that he was deprived of his property and liberty without authority of law. This position is based on the petitioner's contention that the Appellate Division of the New York State Supreme Court, Second Department and the Grievance Committee delegated and authorized to hear and report lacked the constitutional and/or statutory authority to hear, evaluate and determine the issue of an attorney's fee within the construct of a disciplinary grievance committee hearing. It was therefore void because it was a) in contravention of the Petitioner's due process rights under the 5th, 6th 8th and 14th Amendments to the U.S. Constitution and b) based on a void decision of the State court because it lacked the constitutional and/or statutory authority to hear, evaluate and determine the issue of an attorney's fee within the construct of a disciplinary grievance committee hearing.

REASONS FOR GRANTING CERTIORARI

To the Petitioner's knowledge his is the only reported federal or state case that could affect every attorney in the United States by permitting a State Grievance Committee to value of all an attorney's work in progress, and provide for a grievance committee disciplinary proceeding as a forum to evaluate any attorney's fee that is called into question, either sua sponte, by the court, or Grievance Committee by virtue of a client's complaint for charging an alleged excessive fee. The important issues raised by this case are as:

a) Whether the Federal District Court had subject matter jurisdiction over the issues raised in the Petitioner's complaint?

b) Whether the Court of Appeals or the Federal District Court may rely on or use, for any purpose, another court's decision or judgment that is challenged as void for want of subject matter jurisdiction without first determining the threshold question of jurisdiction of that other court?

c) Whether the Petitioner was entitled to a jury trial in the State Court to first determine the value and the reasonableness of the attorney's work, labor and services or whether the issues determinative of the value and the reasonableness of the attorney's work, labor and services involved may be resolved within the construct of a grievance committee disciplinary proceeding over petitioner's objection.

The far reaching consequences to the every member of the federal or state bar in affecting one's livelihood, and consequently what amounted to a confiscation of property, dictates that these issues raised be resolved by this Court.

A. The Prior Court Proceedings

It is the Petitioner's contention that the Appellate Division of the Supreme Court of the State of New York acted without subject matter jurisdiction, in excess of the power granted to it by a New York State Constitution or state statute. The Petitioner contends that its order and decision suspending the petitioner from the practice of law and confiscating all the petitioner's legal work in progress based on these State Court actions are therefore void. When court lacks jurisdiction of the subject matter or of the parties, its order, or judgment is a nullity and is void, and will be so treated when it comes in question either directly or collaterally, Kamp v. Kamp, 59 N.Y. 212, Risley v. Phenix Bank, 83 N.Y. 318, aff'd. 111 U.S. 125, 28 L.Ed. 374, 4 S.Ct. 22, Losey v. Stanley, 147 N.Y. 560, 42 N.E. 8. When a court acts without jurisdiction, the party aggrieved is entitled to direct and summary relief, Brookley v. Ives, 243 A.D. 487, 278 N.Y.S. 147.

A court's jurisdiction may be questioned in direct or collateral attack at any time, even for the first time upon appeal. When the Court's subject matter jurisdiction is challenged, the Court must make an inquiry into this issue before it can rely thereon, MacAffer v. Boston & M.R. Co., 268 N.Y. 400, 197 N.E. 328., Doey v. Clarence P. Howland Co., 224 N.Y. 30, 120 N.E. 53, cert. den. 248 U.S. 574, 63 L.Ed. 428. 39 S.Ct. 11. The petitioner raised the issue of the subject matter jurisdiction of the New York State Courts to entertain, evaluate and/or decide the issues attorney's claim for work, labor and services within the construct of a Grievance Committee disciplinary hearing and/or without a prior trial by jury within the State Grievance Proceeding, within the federal complaint, motion practice and appeal to the Second Circuit.

However, at no point, did any court below decide that threshold issue. The petitioner continues now to collaterally attack the decisions below based on the question of the subject matter jurisdiction of the State Court, since no determination of the

underlying State Court jurisdiction has been made by any court below.

An attorney's claim for work, labor and services was, and is, enforceable by a suit at common law, for money damages only, called Assumpsit, now called Breach of Contract, Lynn v. Agnew, 179 A.D. 305, 166 N. Y. S. 274, judgment affirmed Lynn v. McCann, 123 N.E. 877, 226 N.Y. 654, Stevens & Cagger v. Adams, 23 Wend. 57, affirmed Adams v. Stevens & Cagger, 26 Wend. 451, Spencer v. Bush, 98 N.Y.S. 690, Werner v. Knowlton, 94 N.Y.S. 1054, 107 A.D. 158, Greenberg v. Jerome H. Remick & Co., 129 N.E. 211, 230 N.Y. 70, reversing judgment 181 N.Y.S. 987, 191 A.D. 947. That, as a matter of history and legal precedent, the issues of controverted fact within this claim were entitled to be tried and determined before a jury as a matter of right, Ward v. Orsini, 152 N.E. 696, 243 N.Y. 123, Werner v. Knowlton, supra, Steele v. Hammond, 121 N.Y.S. 589, 136 A.D. 667, Everitt v. Mitchell, 202 N.Y.S. 260. The Petitioner claims that the Appellate Division did not have subject matter jurisdiction, within the construct of a Grievance Committee disciplinary hearing, and/or without a prior trial by jury in a Supreme Court Trial Term, to 1) determine the Petitioner's right to a specific sum for work, labor and services performed, 2) direct the Petitioner to vacate judgments of record, 3) punish and penalize the Petitioner by bringing about a forfeiture of the Petitioner's law practice (approx. 80 civil cases in progress) and/or 4) prevent the Petitioner from obtaining employment in any category or subcategory of work in the law field. The Petitioner submits that the specific provisions of the New York State Judiciary Law, §90(2), and the Appellate Division Second Department Court Rules, Part 691.10, are unconstitutional in general, when used to determine or applied to an attorney's fee, and specifically as they were applied to the Petitioner.

The New York State Judiciary Law, §90 subd.(2) provides that the Appellate Division shall have original jurisdiction over the discipline of attorneys.

The courts, however, do not have the constitutional or statutory authority to enact substantive rules affecting an attorney's

right to contract with his/her client with respect to fees, or be restricted in the manner of his compensation after suspension, Cair v. Peck, 6 N.Y. 2d 97, 188 N.Y.S. 2d 491. The statutory power to discipline attorney's conduct is limited to censure, suspension or removal for professional misconduct, malpractice, fraud, deceit, crime, misdemeanor or conduct prejudicial to the administration of justice. It is found in Judiciary Law §90(2), which provides, in part:

> The supreme court shall have power and control over attorneys and counsellors-at-law and all persons practicing or assuming to practice law, and the appellate division of the supreme court, in each department, is authorized to censure, suspend from practice or remove from office, any attorney and counselor-at-law, admitted to practice, who is guilty of professional misconduct, malpractice, fraud, deceit, crime or misdemeanor, or any conduct prejudicial to the administration of justice ....

An attorney's right to be compensated for his/her services is also protected by the common law, In Re Britton's Will, 60 N.Y.S.2d 466, at 474, Kaplan v. Reuss, 495 N.Y.S.2d 404, 113 A.D.2d 184, affd 506 N.Y.S.2d 304, 68 N.Y.2d 693, Matter of Rosenblum, 503 N.Y.S.2d 605, 121 A.D.2d 546. The basic common law principle that one cannot do indirectly what one cannot do directly was not applied in this matter. The State Court had no authority in law to decide the issues determined therein and ought not to be permitted to rely on a state disciplinary proceeding that assumed subject matter jurisdiction over controverted facts for breach of contract where no jurisdiction was granted to the Appellate Division by the Constitution to hear and determine the issues, N.Y. State Const. of 1894 Art. 6 §§ 1, 2, 4k, Waldo v. Schmidt, 200 N.Y. 199, 93 N.E. 477, Re Pye, supra, Peterson v. Ocean Electric R. Co., 161 A.D. 720, 146 N.Y.S. 604, affd 214 N.Y. 43, 108 N.E. 199. The Appellate Division ought not to be permitted to delegate authority to a Referee to hear and determine suits at common law, when the authority to hear and determine the

controverted fact issue was not granted to the Appellate Division. The Petitioner contends that the actions of the State acting through the Court, Grievance Committee and Referee violated the Petitioner's U.S. Constitutional rights to due process of law under the 5th, 6th, 8th and 14th Amendments and under 42 U.S.C. §1983 as described below.

When the issues in a case or controversy or special proceeding are triable by a jury, the State must give the participants an opportunity to demand a trial of the issues involving controverted facts. In this matter the Petitioner was denied his right as guaranteed to him by the New York State Constitution Art. 1 §2.

The Petitioner submits, that a) the specific provisions of the N.Y.S. Judiciary Law, §90(2), and b) the Appellate Court Rules Part 691, violate and/or lack constitutional and statutory authority in general, when applied to determine an attorney's fee, or as specifically applied to the Petitioner, to determine his attorney's fee within the construct of a disciplinary Grievance Committee hearing. Section 691.10 of Part 691 of the Appellate Division-Second Department Rules states in part:

> "§691.10 Conduct of disbarred, suspended or resigned attorneys; abandonment of practice by attorney.
>
> (a) Compliance with Judiciary Law. Disbarred, suspended or resigned attorneys at law shall comply fully and completely with the letter and spirit of sections 478, 479, 484 and 486 of the Judiciary Law relating to practicing as attorneys at law without being admitted and registered, and soliciting of business on behalf of an attorney at law and the practice of law by an attorney who has been disbarred, suspended or convicted of a felony.
>
> (b) Compensation. A disbarred, suspended or resigned attorney may not share in any fee for legal services performed by another attorney during the period of his removal from the bar. A disbarred,

> suspended or resigned attorney may be compensated on a quantum meruit basis for legal services rendered and disbursements incurred by him prior to the effective date of the disbarment or suspension order or of his resignation. The amount and manner of payment of such compensation and recoverable disbursements shall be fixed by the court on the application of either the disbarred, suspended or resigned attorney or the new attorney, on notice to the other as well as on notice to the client. Such applications shall be made at special term in the court wherein the action is pending or at special term in the Supreme Court in the county wherein the moving attorney maintains his office if an action has not been commenced. In no event shall the combined legal fees exceed the amount the client would have been required to pay had no substitution of attorneys been required."

It is submitted that the restrictions and limitation placed upon the amount of compensation due(limited to quantum meruit) and the manner in which the compensation is determined by virtue of this section are in direct conflict with the common rights of the Petitioner and section 474 of the Judiciary Law. The Petitioner, according to this Appellate rule, loses his contractual rights previously obtained with *all his client(s)* (Emphasis added) by virtue of his suspension. The Petitioner loses his right to a jury trial and to all discovery on the issue of his compensation being at once relegated only to quantum meruit. In the Petitioner's case the Appellate Division stated that the confessions of judgment were required to be vacated and determined the upper limit of what the Petitioner was entitled to as an attorney's fee. The State, acting through its political subdivision, the Court, therefore affected the substantive and procedural enforcement of the Petitioner's contractual rights. Again, these effects emanate from the results of a Grievance Committee disciplinary hearing that determined the very issue of the Petitioner's compensation. The Petitioner submits

that these substantive and/or procedural restrictions emanating from the construct of a Grievance Committee disciplinary hearing violate the constitutional limitation on the State with respect to the impairment of the obligation of contracts. Such actions are in direct opposition to the Petitioner's right to a plenary trial to determine the issues of controverted fact by a jury in respect to the value of his legal services pursuant to his written contract.

In every case in which the Petitioner was the attorney of record, §691.1(b) limits the recovery of the Petitioner to only quantum meruit. In the Petitioner's view the State has no legitimate involvement because no public purpose is served and the State is not a party to the contract. Each client's legal fee should be determined by enforcing the retainer in a plenary trial where the controverted facts are determined by a jury.

POINT TWO

THE FEDERAL COURTS HAVE THE POWER TO REVIEW STATE COURT DISCIPLINARY PROCEEDING AND DECISIONS

The Federal Courts have the power to review State Court disciplinary proceeding and decisions when the State Court procedure is wanting in due process, Matter of Gordon, 640 F.2d 1143, or when violative of 42 U.S.C. §1983, Getty v. Reed, 547 F.2d 971.

The Court of Appeals decision was based on District of Columbia Court of Appeals v. Feldman, 460 U.S. 462, 486 (1983). In that case the Court held that the Federal District Courts do not have jurisdiction . . . over challenges to state court decisions in

particular cases arising out of judicial proceedings even if those challenges allege that the state court's action was unconstitutional.

The petitioner contends that such a holding should not be followed in this case as it would lead to an absurd and untenable stare decisis. Unlike the Feldman case, supra, the instant matter is a collateral attack on the very authority of the Court to rule on the issues determining the rights and obligations of the parties thereto.

The problem with using that case as the basis for the instant decision is that a) this case involves a collateral attack on the very power of the State Court to rule on the issues before it, specifically the subject matter jurisdiction of the Appellate Division of the Supreme Court of the State of New York to evaluate the nature and extent of an attorney's fee with the construct of a Grievance Committee disciplinary proceeding and b) the decision sought to be collaterally attacked is not one from the highest court of the State of New York. It is the very essence of the finality doctrine that precluded the Petitioner from a direct route to the Supreme Court of the United States since this the decision appealed from was from an intermediate State Appellate Court, namely, the Appellate Division, Second Department of the Supreme Court of the State of New York. Contrary to the Second Circuit Court of Appeals decision at A-4 that, "Jacobs' appeal as of right to the New York Court of Appeals was dismissed on the grounds that no substantial constitutional question was directly involved and his application for leave to appeal was denied," the Petitioner never appealed as of "right" but only sought leave to appeal. In any event the Petitioner contends that substantial federal questions existed then and continue to exist unanswered by any court below. Among them are the basic fundamental concepts of the right to be tried by a tribunal constitutionally or statutorally empowered to hear and determine the issues concerned with the matter before it, the right to discovery in a proceeding that could and did result in the loss of the Petitioner's livelihood and license to practice law, the right to a jury trial on the issue of the value of one's legal work, labor and/or services, the right to subpoena witnesses and documents in a proceeding termed quasi-criminal in nature, the

right to confront adverse witnesses who have been permitted by the State without appearance to offer adverse testimony and affidavits without cross-examination.

Both the questions of the finality of the State decision and the underlying authority of the State Court to hear and determine the issues before a court of limited jurisdiction distinguish the facts of the instant case from the Feldman case, supra. In the instant case the Court of Appeals for the Second Circuit erred when it pronounced that the Court of Appeals of the State of New York denied the petitioner's appeal as a mater of right. No formal appeal was ever decided on the merits after submission because both the Appellate Division of the Supreme Court of the State of New York and the Court of Appeal of the State of New York denied the petitioner leave to appeal. The petitioner was foreclosed from any higher appellate review. Both the State Courts and the Federal District Court had the issue of the subject matter jurisdiction of the Appellate Division of the Supreme Court of the State of New York to evaluate the nature and extent of an attorney's fee within the construct of a Grievance Committee disciplinary proceeding. Each Court failed to evaluate and decide that critical issue. In such an instance when critical issues are left undecided the petitioner may not ask for a writ of certiorari from the Supreme Court of the United States nor may the petitioner appeal to that Court because it is considered a nonfinal decision of a lower State Court, Collins v. Miller, 252 U.S. 364, 370 (1920), Houston v. Moore, 3 Wheat. 433, 434 (1818). It is nonfinal in so far as it did not reach critical issues that could have dictated an opposite result, San Diego Gas & Elec. Co. v. San Diego, 450 U.S. 621,632-33 (1981), Whitney v. California, 274 U.S. 357, 360 (1927).

In the instant case the Federal District Court had jurisdiction to issue an injunction to stay enforcement of the decision and order of the Appellate Division of the Supreme Court of the State of New York. The Feldman case, supra does not foreclose the Petitioner from access to the Federal District Court where a nonfinal decision

of an intermediate State Appellate Court has effectively deprive the Petitioner of his rights protected by the 5th, 6th, 8th and 14th Amendments to the Constitution of the United States, 42 U.S.C. § 1983, and to the right to trial by jury protected by the New York State Constitution under N.Y.S. Const. of 1894 Art. VI §§ 1, 2, 4k, New York State Constitution Art. 1 § 2, 1848 N.Y. Laws, ch. 3791876 N.Y. Laws, ch. 448.

POINT THREE

THE PETITIONER MADE ALLEGATIONS IN HIS COMPLAINT THAT RAISED ISSUES OF FEDERAL QUESTION JURISDICTION

The Petitioner was denied his substantive and procedural due process rights under the 6th Amendment to the Constitution of the United States, New York State Constitution, Art. 1 § and under 42 U.S.C. §§1983.

A disciplinary hearing is an adversary proceeding. It is criminal in nature since it involves the loss of livelihood, In re Ruffalo, 390 U.S. 544, 551. Any ambiguity or doubt must be resolved in favor of the attorney who is the subject of the disciplinary hearing, Erdmann v. Stevens, 458 F.2d 1205.

The New York State Constitution has a parallel provision, Art. 1 §2, that states that the right to a jury trial shall remain inviolate.

At common law, the cause of action for the value of legal work, labor and services was called Assumpsit. It required a jury trial. Since this right existed before the New York State Constitution was ratified, it must be afforded to the Petitioner.

The Court, in the case entitled, In Re Britton's Will, 60 N.Y.S. 466, declared, citing In Wilkins v. Carmichael (1 Doug. 101), and referring to Lord Mansfield, refers to this suit at common law as "A practice established upon general principles of justice, by which an attorney may obtain an order to stop his client from

receiving money recovered in a suit in which the attorney was employed, until his bill is paid. It was introduced into the common-law courts from the Court of Chancery, Turwin v. Gibson, 3 Atk. 720, and like the practice of setting off judgments, and other equitable powers incident to courts of common law, it has always been a matter of equitable cognizance. The mistake lies in confounding a right to trial by jury,--which would exist if the attorney had brought an action against his client, and sought to obtain a judgment,--with a proceeding for an equitable application of funds under the control of the courts.

This latter quotation contains the important point to be considered, namely, whether a proceeding in effect is one at law to secure a money judgment or one in equity to enforce an equitable lien. When it is the latter, the matter is determined by the court without a jury. Matter of Goldin v. Duncan, 216 A.D. 472, 215 N.Y.S. 445; Matter of Pieria, 82 A.D. 466, 81 N.Y.S. 927, affirmed 176 N.Y. 566, 68 N.E. 1123; Matter of Popek's Estate, 157 Misc. 421, 283 N.Y.S. 758; Matter of Levine's Estate, 154 Misc. 700 , 278 N.Y.S. 36; Matter of Podell, 138 Misc. 6, 245 N.Y.S. 28; Machcinski v. Lehigh Valley R. Co., 2 Cir., 272 F. 920; and Application of Linder, D.C., 16 F.Supp. 605. The first part of §474 of the Judiciary Law provides the basis for the relation between the attorney and his client, as follows: 'The compensation of an attorney or counsellor for his services is governed by agreement, express or implied, which is not restrained by law.' An action by an attorney against his client on such an agreement or contract not connected with an application to fix and enforce a lien upon a fund in the court's jurisdiction, would be a simple action at law, triable by jury. That is the type of action differentiated in the quoted portion of Ackerman v. Ackerman, 14 Abb. Prac. 229 (1862). It may be that such was the type of action which the courts had in mind in the dicta above referred to. However, the Surrogate's Court never had and does not have jurisdiction over that type of an action. Matter of Lake's Estate 219 A.D. 530, 220 N.Y.S. 323; Matter of Smith, 111 A.D. 23, 97 N.Y.S. 171; and see Matter of Anderson's Estate, 136

Misc. 110, 240 N.Y.S. 532; and Matter of Post's Estate, 155 Misc. 389, 279 N.Y.S. 408."

The Petitioner was not afforded an opportunity for a jury trial at any stage of the proceedings on any issue of controverted fact. The Appellate Division not only delegated its alleged authority to a Referee to hear and determine all issues of fact, it permitted the Referee to evaluate the amount of the Petitioner's fee based on the Grievance Committee attorney's evaluation of the number of hours expended by the Petitioner. The Appellate Division also ordered the Petitioner to vacate the two judgments of record that had been duly filed and recorded in the Nassau County Clerk's Office. There is no authority, either constitutional or statutory that empowers the Appellate Division of the State of New York to vacate a Judgment of record within the construct of a grievance committee disciplinary proceeding. Without the opportunity for the Petitioner to have a trial by jury, the Appellate Division also caused a forfeiture of all of the Petitioner's legal cases in progress as part of its decision, restrained the Petitioner from engaging in any form of the practice of law for three years, and required the Petitioner to be tested on the code of professional responsibility as a condition of reinstatement.

The Petitioner was denied his substantive and procedural due process rights under the 6th Amendment to the Constitution of the United States and parallel provisions under the New York State Constitution and under 42 U.S.C. §§1983, 1985.

There was a lack of any reasonable standards or guidelines provided to enable the Petitioner to be on notice of the requirement(s) for conduct for which the Petitioner was held answerable, in either the State Court proceeding or the Federal Grievance proceeding, Hurtado v. California, 110 U.S. 516 (1884), Connally v. General Construction Co., 269 U.S. 385 at 391(1926), Boyce Motor Lines, Inc. v. United States, 342 U.S. 337 at 340 (1952), Sniadach v. Family Finance Corp. et al., 395 U.S. 337 (1969), Fuentes v. Shevin, 407 U.S. 67 (1972). Goldberg v. Kelly,

397 U.S. 254 (1970), Perry v. Sinderman, 408 U.S. 593 (1972), Goss v. Lopez, 419 U.S. 565 (1975), U.S. Const. Art. 1, §10, Ex Parte Garland, 4 Wall. 333 (1867), Calder v. Bull 3 Dall. 386 (1798). When making the boundaries of criminal conduct the Court must decline to impose punishment for actions that are not "plainly and unmistakably" proscribed, U.S. v. Gradwell, 243 U.S. 476, 485 (1917). A fair trial in a fair tribunal is a basic requirement of due process.

The Petitioner was denied his Constitutional rights to confrontation and the use of subpoenas as guaranteed by 6th Amendment to the U.S. Constitution and parallel provisions in the New York State Constitution and 42 U.S.C 1983, because in the State Referee conducting the Grievance Committee proceedings,

1) refused to enforce duly authorized subpoenas for the presence of witnesses, including Dominick Pelle and the records of Pelle & Pelle, Esqs., the attorneys for the complainant's husband in both in the Supreme Court, Nassau County Matrimonial Action and in the Nassau County Family Court proceedings. The information demanded in the subpoena reflected the billing of Pelle & Pelle, Esqs. to the complainant's husband for the legal services rendered to him. The information that would have been provided by them was necessary to assist the Petitioner in proving the time and nature of the legal services performed by the Petitioner in connection with the matrimonial and Family Court proceedings of the complainant. That information was intended to help the Petitioner prove the services and the hours expended representing the complainant since there would be a direct correspondence regarding the appearances in both Courts for conferences, hearings and the like. Dominick Pelle, Esq.'s refusal to appear and the refusal of the Referee to enforce his own "So Ordered" Subpoena unduly prejudiced the Petitioner's defense since a) there was no other source available to the Petitioner for this information, Washington v. Texas, 388 U.S. 14 at p. 19, 1967, and b) an affidavit from Dominick Pelle, Esq. submitted by Mr. Pelle, and accepted by the Referee and entered into evidence in lieu of Mr. Pelle's participation in the hearing. Mr.

Pelle's statements in his affidavit were accepted as true on their face without ever subjecting him to cross-examination. The Petitioner was effectively precluded from exercising his right to question or cross-examine Dominick Pelle, Esq., a very damaging absent witness. The content of Dominick Pelle, Esq.'s affidavit was referenced by the Referee in his decision and the decision of the Federal Grievance panel also referenced this affidavit and

2) The Referee refused to permit the Petitioner to cross-examine the complainant with respect to a tape recording in which the complainant admitted 1) knowledge of the fees, and 2) that she was responsible for paying the fees.

The Petitioner, during his cross-examination of the complainant in the State proceeding was not permitted to interrogate the complainant with respect to all of the charges. A transcript of a tape recorded conversation between the complainant and the Petitioner was identified at the State hearing. This tape recording was previously listened to, examined, and its content agreed upon between the State Grievance Committee's attorney and the Petitioner. The tape recording of the conversation between the Petitioner and the complainant was made with the complainant's knowledge and consent. Both the testimony of the Petitioner and the Petitioner's witness, Dr. Gunsberger, bear this out. The Referee continually denied the Petitioner the opportunity to use the transcript of the tape recorded telephone conversation for purposes of impeachment during the Petitioner's cross-examination of the complainant. These actions on the part of the Federal Grievance Committee and the State Appellate Division violated the Petitioner's rights to a fair hearing and the right to effectively confront the Petitioner's accuser and main witness under the 5th, 6th and 14th Amendments to the U.S. Constitution and parallel provisions under the New York State Constitution, Mattox v. United States, 157 U.S. 237, 535, 536, (1895).

An additional 6th Amendment and procedural due process violation occurred when the Referee denied the use or entry of the transcript of the tape recorded telephone conversation into evidence at the time when the complainant was on the witness stand. At the

very end of the hearing, the defendant, Mr. Guido, the Grievance Committee's attorney, offered to permit the entry of the transcript of the tape recorded telephone conversation into evidence, as he put it, "To avoid any reversible error on appeal." The transcript of the tape recording was then admitted. The Referee then refused the Petitioner's request to recall the complainant to be cross-examined after the transcript of the tape was admitted into evidence. The Referee failed to permit the Petitioner the opportunity to effectively cross examine or confront the complainant. This nullified the impact of the cross-examination of the complainant during the hearing, by refusing to permit the Petitioner to use the transcript of the tape recorded telephone conversation for at least impeachment purposes. These actions on the part of the Referee and Appellate Division violated the Petitioner's rights to a fair hearing and the right to effectively confront the Petitioner's accuser and main witness under the 5th, 6th and 14th Amendments to the U.S. Constitution and parallel provisions under the New York State Constitution.

3) Including evidence of collateral acts involving the criminal representation of the complainant by the Petitioner, without prior notice to the Petitioner, and without the Petitioner being charged with any acts in connection therewith.

During the State hearing the complainant testified with respect to a criminal charge brought against her for aggravated harassment. The complainant was arrested and charged with using her telephone to make prank calls, harassing her husband's girlfriend over a period of months in 1987. The Petitioner also represented the complainant in that matter. Since the Petitioner was not charged with any acts which were the subject of that representation, this testimony by the complainant was a complete surprise to the Petitioner. The complainant's testimony in regard to this matter was offered and accepted by the Referee during the hearing. The Petitioner objected to the entire portion of the hearing concerned with this testimony, but was overruled. The Petitioner's substantive and procedural rights were violated with the introduction into the

hearing of prejudicial testimony completely extraneous to the charges.

4) Permitting, considering and using as one bases for the penalty imposed, the inclusion in the post-hearing motion to confirm the State Referee's report, prior involvements of the Petitioner with the State Grievance Committee, without any prior notice to the Petitioner or allowing the Petitioner the opportunity to defend and/or explain these prior involvements at the hearing.

The Grievance Committee attorney's post-hearing motion to confirm the Referee's report contained completely extraneous, prejudicial findings of the Petitioner's prior involvement with the Grievance Committee. These other matters that were submitted to the State Referee by the Grievance Committee bore no relation to the charges that were before the Referee. They were remote in time and circumstance and not related to the instant underlying charges. Their cumulative effect was and is prejudicial to the Petitioner in regard to their inclusion before the Appellate Division that stated it considered and included those past findings in setting out the three year suspension. They essentially were and are an attempt by the Grievance Committee to further charge the Petitioner in this proceeding with prior acts, some of which were not based on any hearing whatsoever. The prior incidents that were related in the Grievance Committee's post-hearing motion to confirm the report of the Referee completely undercut the principles of due process. Their inclusion in the Grievance Committee's post-hearing memorandum and/or motion to confirm the Referee's report violated the Petitioner's due process rights to a fair hearing since they were referred to and offered for consideration only after the hearing was closed without any opportunity for the Petitioner to offset their prejudicial effect, Washington v. Texas, 388 U.S. 14 at 19 (1967).

The Petitioner's substantive due process rights were violated in that nothing in the Referee's report to the Appellate Division and nothing in the Appellate Division's decision and order referred to or indicated any relationship between the Petitioner's prior involvement with the Grievance Committee, the acts that form the

basis for the charges, and the reason or reasons the charges were sustained or the measure of discipline imposed on the Petitioner. None of the prior incidents was ever discussed in terms of its nature and/or consequent involvement in the initial phase of the Grievance Committee's investigatory process. None of the prior incidents was ever discussed in terms of nature and/or consequent involvement prior to the service of any charges and specifications on the Petitioner.

No notice was given to the Petitioner that his alleged or actual prior acts would be a consideration in determining the sanction or punishment. In a disciplinary hearing, the attorney is entitled to prior notice that the disciplinary body would consider prior disciplinary action against the Petitioner in fixing his punishment. Failure to do so is a violation of due process, Sexton v. Arkansas Supreme Ct., Committee on Professional Conduct, 730 F. Supp. 285, Washington v. Texas, 388 U.S. 14, (1967). This should be especially true when the prior discipline did not result from a hearing.

The Petitioner claims that the defendants violated his constitutional rights under the 8th Amendment to the Constitution of the United States and parallel provisions under the New York State Constitution and under 42 U.S.C. §§1983, 1985.

This argument specifically is that, as a result of the decision and order of the Appellate Division, the Petitioner was a) required to vacate the two confessions of judgment of record, punished and penalized bringing about a forfeiture of the Petitioner's law practice (approx. 80 civil cases in progress) and/or c) prohibited from obtaining employment in any category or subcategory or work in the law field as agent or principal within the construct of a Grievance Committee hearing and without a trial by jury. There was no specific finding made by the Referee or the Appellate State Court that the Petitioner violated:

a) Any rule, specific statute, law, and/or regulation;

b) Any recognized or codified standard with reasonable specificity;

c) Any moral, or ethical behavior or any conduct prescribed by law; or practiced

d) Any deceit, dishonesty, overreaching, undue influence with respect to the complainant.

The Petitioner was never charged with any of the above nor were these violations claimed or proven to have been committed by the Petitioner. Nothing that the Petitioner did was intended to harm. The Petitioner's only motivation was to secure payment for his services. The Petitioner is truly sorry if the complainant was harmed in any way by his actions. However, the evidence presented at the hearing indicated:

a) The complainant suffered no monetary loss,

b) The complainant's "credit" was never impaired from the time the first Confession of Judgment was filed to date,

c) The complainant suffered no other form of loss or impairment due to the Petitioner's representation of her to date,

d) The Petitioner negotiated with the complainant the value of his services and reflected this in the confessions of judgment, and

e) There was no evidence that the complainant paid the Petitioner anything for almost four years of legal services.

For a sanction to be validly imposed, the conduct in question must be in fact sanctionable under the authority relied upon. Such a sanction is tantamount to a criminal fine and penalty violative of due process, In re Yagman, 796 F.2d 1165, 1182-3 (9th Cir. 1986). A specific finding of bad faith, however, must precede any sanction under the Court's inherent powers, Roadway Express v. Piper, 447 U.S. 752, 764, 100 S.Ct. 2455, U.S. v. Hudson, 11 U.S. 32 (7 Cranch, 1812). No specific finding of bad faith was made with regard to this Petitioner by anyone to date.. There must be a specific finding in the record. There must be a violation of sufficient gravity as to evidence a lack of moral fitness to practice law. The Federal Court cannot assume that the court below made this finding. It must be clearly stated, Matter of Thalheim, 853 F.2d

383 (5th Cir, 1988). The charges must be sustained by clear and convincing evidence, proof and the misconduct must be shown to have been fraudulent and the result of improper motive. There must be proof of intent. Suspension for three years entails the complete loss of livelihood, clientele with the consequent uphill road of patient waiting to again re-establish himself in the eyes of the public, in the good graces of the courts and in his fellow lawyers, In re Fisher, 179 F.2d 361 at 369.

As stated above, no evidence was presented at the Petitioner's disciplinary proceeding and none was submitted to the Appellate Division to provide a basis for a specific finding by any court or judge that anything that was claimed or proven to have been done or not done by the Petitioner violated any

a) rule, specific statute, law, and/or regulation;

b) recognized or codified standard with reasonable specificity;

c) moral, or ethical behavior or any conduct prescribed by law; or practiced

d) deceit, dishonesty, overreaching, undue influence with respect to the complainant.

Without the ability to settle or try the pending cases, the Petitioner is now placed in the position of losing his livelihood because of these charges. No loss resulted to the one client involved. The measure of the penalty imposed involved the consideration of past acts for which the Petitioner had already been punished. This was in violation of the Petitioner's civil rights under the 5th, 6th, 7th and 8th and 14th Amendments to the Constitution of the United States and parallel provisions under the New York State Constitution, under 42 U.S.C. §1983, and U.S. Const. Art. 1, §10, Commonwealth ex rel. Wall v. Smith 345 Pa. 512, 29 A.2d 912, 913, Ex parte Flora, Ohio App., 31 N.E.2d 482, 485, Andrus v. Mcauley, D.C. Wash., 21 F. Supp. 70.

The Petitioner was denied among other protected rights, his substantive and procedural due process rights under the 14th Amendment to the Constitution of the United States and parallel

provisions under the New York State Constitution and under 42 U.S.C. §§1983, 1985.

The Petitioner's 14th Amendment argument is that the United States Supreme Court and the lower Federal Court cases cited above and the basis for them, as described above, are binding on the Federal District Court for the Eastern District of New York and its Grievance Committee. The Petitioner's position is that they defendants violated and deprived the Petitioner of his constitutional rights under the 5th, 6th, 8th and 14th Amendments to the U.S. Constitution and the Petitioner's civil rights under 42 U.S.C. 1983 as described above. The Federal District Court for the Eastern District of New York and its Grievance Committee, all in their official capacities and/or their individual private capacities, either singularly or in concert, acted to deprive the Petitioner of his rights, including his civil rights without due process of law as described above. In essence the Petitioner is claiming that the loss of his clientele, livelihood (ongoing single practitioner with 80 active files), income, the stigma of suspension from practice, loss of all relationships with clients and colleagues, and loss of home through depletion of funds, was cruel and unusual punishment completely outside the bounds of reason and without any specific finding or immoral conduct. An added consideration is the fact that the Petitioner has never collected any remuneration from the complainant for over four years worth of work on her behalf.

The Court has, in effect, charged, determined guilt and punished the Petitioner with respect to acts that were and are in no way criminally or civilly wrong in nature or codified in law at the time that the Petitioner was alleged to have committed them. In effect the Court has defined a violation; imposed a sentence, penalty and forfeiture upon the Petitioner when no violation existed at the time Petitioner acted, denied him a jury trial under the guise of a disciplinary hearing; failed to permit the introduction of exculpatory documentary evidence and/or call exculpatory witnesses for the Petitioner; denied the Petitioner access to exculpatory records; interfered with the parties' obligation clearly described and

acknowledged in a contract for work, labor and services without a jury trial; and exacted a penalty from the Petitioner that bears no relation to the acts committed.

Certain principles have remained relatively immutable in our jurisprudence. One of these is that where governmental action seriously injuries an individual, and the reasonableness of the action depends on fact findings, the evidence used to prove the government's case must be disclosed to the individual so that he has an opportunity to show that it is untrue, Green v. McElroy, 360 U.S. 474 (1959).

CONCLUSION

The petition for a writ of certiorari should be granted.

June 25, 1995 Respectfully submitted,

DAVID B. JACOBS, pro-se
145 D Smith Street Apt. 1D
Freeport, New York 11520
516 868-4591

RJM BKNY

93-CV3566
PLATT

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

At a stated Term of the United States Court of Appeals for the Second Circuit, held at the United States Courthouse in the City of New York, on the 5th day of April thousand nine hundred and ninety-five.

PRESENT:

HON. ROGER J. MINER,
HON. FRANK X. ALTIMARI,
HON. JOSE A. CABRANES,
Circuit Judges.

DAVID B. JACOBS, Esq.,

Plaintiff-Appellant,

v.

ORDER
94-7939

ROBERT P. GUIDO; FRANX A. FINNERTY, JR.; GRIEVANCE COMMITTEE FOR THE TENTH JUDICIAL DISTRICT; MOSES M. WEINSTEIN; PATRICIA WARMHOLD; DOMINICK PELLE; DAVID PELLE; GUY JAMES MANGANO, JR.; WILLIAM C. THOMPSON; LAWRENCE J. BRACXEN; THOMAS R. SULLIVAN; SONDRA MILLER; and STATE OF NEW YORK,

Defendants-Appellees.

UPON CONSIDERATION of this appeal from a judgment of the United States District Court for the Eastern District of New York, it is hereby

ORDERED, ADJUDGED, AND DECREED that the judgment be and it hereby is AFFIRMED.

Plaintiff-appellant David Jacobs appeals from a judgment entered on September 23, 1994 in the United States District Court for the Eastern District of New York (Platt, C.J.) dismissing the complaint with prejudice, the district court having found that the State of New York and the Grievance Committee were entitled to Eleventh Amendment immunity, that the judicial defendants were entitled to absolute immunity, and that plaintiff failed to state a cause of action against defendant Warmhold.

Plaintiff-appellant David Jacobs was a practicing attorney in New York. On March 8, 1993, the New York State Supreme Court, Appellate Division, Second Department, suspended Jacobs from practicing law in New York State for three years for charging excess fees and other unethical conduct. Jacobs commenced this action against the State of New York, the Grievance Committee for the Tenth Judicial District, which recommended the disciplinary charges (collectively the "state defendants"), the five justices of the Appellate Division (Justices Mangano, Thompson, Bracken, Sullivan, and Miller), who issued the suspension order, Honorable Moses Weinstein, who served as the Special Referee in the disciplinary proceedings, the Grievance Committee's Chief Counsel, Frank Finnerty, and Assistant Committee Counsel Robert Guido, who was assigned to prosecute the charges (collectively referred to as the "judicial defendants"). Jacobs also named his former client, Patricia Warmhold, as a defendant in the action.[1]

[1] Jacobs also named two other attorneys who allegedly had advised Warmhold on certain matters. Jacobs subsequently discontinued the action against those two defendants.

Jacobs alleged that the disciplinary proceeding that resulted in his suspension from the practice of law violated his constitutional rights. He requested a declaration that the order of suspension was void, immediate reinstatement of his license, a statement of retraction by the Appellate Division, and approximately $30,000,000 in damages.

The disciplinary proceeding at issue was commenced because Warmhold had complained that Jacobs charged her excessive fees, required her to execute two confessions of judgment, and attempted to limit his potential liability for possible malpractice in connection with certain domestic relations matters in which he had represented her.

Jacobs alleges the following facts in his complaint: In March of 1985, Warmhold retained Jacobs to represent her in a matrimonial action and agreed to compensate him at the rate of $150 per hour. In July 1987, Warmhold fired and then, shortly thereafter, re-hired Jacobs. At that time, the two decided that Warmhold owed Jacobs $14,500 for services rendered. On August 5, 1987, Warmhold signed a promissory note for $14,500 prepared by Jacobs, and, on August 28, 1987, Warmhold executed a confession of judgment also prepared by Jacobs. Before executing these documents, Warmhold obtained independent legal advice. On August 18, 1988, Warmhold signed a second promissory note and executed a second confession of judgment agreeing to an additional debt of $10,000. Again, Jacobs prepared both of these documents, and again Warmhold obtained independent legal advice.

On July 17, 1990, the Appellate Division, Second Department, granted an application by the Grievance Committee to commence disciplinary proceedings against Jacobs. In a petition dated September 18, 1990, Jacobs was notified that he was charged with five disciplinary violations: (1) charging Warmhold excessive fees (charges 1 and 4); (2) improperly obtaining two confessions of judgment from Warmhold (charges 2 and 5); and (3) improperly

attempting to limit his potential liability to Warmhold for possible malpractice. The Honorable Noses M. Weinstein, a retired appellate division justice, was appointed by the Second Department as a Special Referee to hear the matter and issue findings of fact.

The Special Referee found that the five charges should be sustained, and, on March 8, 1993, a panel of five Appellate Division Justices confirmed the recommendation of the Special Referee and suspended Jacobs from practicing law in the State of New York for three years. Jacobs' application to reargue was denied on May 17, 1993. Jacobs' appeal as of right to the New York Court of Appeals was dismissed on the grounds that no substantial constitutional question was directly involved and his application for leave to appeal was denied.

Jacobs then filed this action in the district court. The district court dismissed the complaint, having determined that the state defendants were entitled to Eleventh Amendment immunity, that the judicial defendants were acting in their judicial capacity and therefore were entitled to absolute immunity, and that Jacobs failed to state a constitutional claim against defendant Warmhold. This appeal followed.

Jacobs contends that the district court erred in dismissing the case on Eleventh Amendment and absolute immunity grounds because he is seeking injunctive and declaratory relief. Although it is well settled that the Eleventh Amendment bars a suit against the state and its agencies in federal court, see Edelman v. Jordan, 415 U.S. 651, 662-63 (1974), absolute immunity only bars suits for money damages against judicial officials acting in their official capacity, see Heimbach v. Village of Lyons, 597 F.2d 344, 347 (2d Cir. 1979). Here, the district court properly dismissed the claims against the state defendants as well as the claims for money damages against the judicial defendants under the immunity doctrines. However, the claims against the judicial defendants for injunctive and declaratory relief should not have been dismissed on immunity grounds.

Nevertheless, we find that the case properly was dismissed because the district court lacked subject-mater jurisdiction.

Jacobs contends that the state court did not have the authority to determine the value of his legal services in the context of a disciplinary proceeding. He challenges the state court's final determination regarding the value of his services and the order to suspend him from the practice of law for three years. While United States district courts "have subject-matter jurisdiction over general challenges to state bar rules, . . . [t]hey do not have jurisdiction . . . over challenges to state court decisions in particular cases arising out of judicial proceedings even if those challenges allege that the state court's action was unconstitutional." District of Columbia Court of Appeals v. Feldman, 460 U.S. 462, 486 (1983). We find that Jacobs' claims that the Appellate Division should not have determined the fair value of his fees and should not have imposed a penalty that bore no relationship to his conduct are "challenges to state-court decisions" in this case. As such, the district court lacked subject-matter jurisdiction and the complaint properly was dismissed.

To the extent that Jacobs asserts a general challenge to the Appellate Division's authority to regulate the bar and claims a constitutional violation under the Contract Clause, see U.S. Const. Art. I § 10, we find those claims to be so lacking in merit as to be frivolous. As to defendant Warmhold, the district court properly dismissed the claims against her. Jacobs failed to assert any federal or constitutional claims against her.

We have considered all of Jacobs' other claims and find them to be without merit.

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

93-CV-3566 (TCP)

DAVID B. JACOBS,

Plaintiff,

ORDER

-against

PLATT, Chief Judge

ROBERT P. GUIDO, et al.,

Defendants.

Plaintiff pro se commenced the instant action via an eighty page complaint consisting of twenty-seven claims seeking, inter alia, relief from a New York State Grievance Committee order dated March 8, 1993 which he alleges suspended him from the practice of law in the New York State courts for a period of three years in violation of his constitutional rights. All of the defendants have moved to dismiss the complaint on various grounds. For the reasons set forth below, all of the motions to dismiss must be and hereby are granted. The State of New York and the Grievance Committee for the Tenth Judicial District are a State and State Agency, respectively and thus are immune from suit under the Eleventh Amendment. See Quern v. Jordan, 440 U.S. 332, 345 (1979). The defendants Robert P. Guido, Frank A. Finnerty, Jr., Hon. Hoses Weinstein, Hon. Guy Mangano, Jr., Hon. William Thompson, Hon. Lawrence Bracken, Hon. Thomas Sullivan and Hon. Sondra Miller were at all times relevant to this complaint acting in their official capacity as participants in a judicial proceeding, and thus are entitled to absolute immunity from civil liability for their actions. See generally Imbler v. Pachtman, 424 U.S. 409, 431 (1976); Doey. Bosenberry, 255 F.2d 118, 120 (2d Cir. 1958).

U.S. 409, 431 (1976); Doey. Bosenberry, 255 F.2d 118, 120 (2d Cir. 1958).

Finally, there is absolutely no evidence to support plaintiff's contention that defendant Patricia Warmhold in any way violated plaintiff's constitutional rights. She filed a grievance in State court in accordance with New York State law against an attorney she felt had acted unethically by overcharging her for his services. See generally McKinney's 1994 New York Rules of Court § 691.4(c). Although plaintiff has alleged a number of constitutional violations in his complaint, his claims against Warmhold are entirely monetary in nature and stem from her refusal to pay him. Amend. Com. at ¶¶176 - 295. Such refusal to pay was the result of alleged misconduct on his part, misconduct properly adjudicated as such by the State Grievance Committee. Any damages incurred by plaintiff were either as a result of reprehensible behavior committed by him and having been properly adjudicated as such may not be imputed to the person who has suffered from such behavior or at most a breach of a contract. Neither of those possible claims arise to a claim of constitutional dimension cognizable by this Court. To the extent that they allege State common law contract claims, this Court declines to exercise supplemental jurisdiction over them. Therefore, plaintiff's claims must and hereby do fail to state a claim upon which relief may be granted.

Plaintiff's "cross motion" for various relief is likewise meritless and thus must be and hereby is denied.

Whereas the Court has made the following findings, the Clerk of the Court is hereby directed to dismiss the complaint with prejudice.

SO ORDERED._____

Chief Judge, U.S.D.C.
Dated: Uniondale, New York
August 22, 1994

THE OPINION OF THE APPELLATE DIVISION

In the Matter of DAVID BARNETT JACOBS, an Attorney, Respondent. GRIEVANCE COMMITTEE FOR THE TENTH JUDICIAL DISTRICT, Petitioner.

Second Department, March 8, 1993

APPEARANCES OF COUNSEL

Frank A. Finnerty, Jr., Westbury (Robert P. Guido of counsel), for petitioner.

David Barnett Jacobs, Woodbury respondent pro se.

OPINION OF THE COURT

Per Curiam.

In this proceeding the respondent is charged with five allegations of professional misconduct. Charge One alleges that the respondent has charged a client a clearly excessive fee, in violation of DR 2-106 of the Code of Professional Responsibility. On or about March 27, 1987, the respondent vas retained to represent a client in a matrimonial matter. On or about August 1987, the respondent charged his client $14,500 for legal services allegedly rendered by him in connection with her matrimonial matter. This $14,500 charged by the respondent included $2,500 in services rendered by the respondent in the form of various legal consultations conducted with his client between March 1984 and March 1987. The balance of $12,000 worth of legal services rendered was allegedly performed by respondent from March 28, 1987, through August 5, 1987, at a rate of $150 per hour, as set forth in the March 27, 1987 retainer agreement. The respondent actually performed no more than 34 hours of legal services between March 27, 1987, and August 8, 1987, therefore, entitling him, to no more than $5,175 pursuant to the retainer agreement.

entitling him, to no more than $5,175 pursuant to the retainer agreement.

Charge Two alleges that the respondent improperly obtained a confession of judgment for legal fees from, his client. On or about August 5, 1987, at the request of the respondent, the client signed a promissory note prepared by the respondent, evidencing a debt owed to the respondent in the amount of $14,500 for legal fees. On or about August 6, 1987, et the request of the respondent, the client executed an acknowledgment before a notary public, acknowledging the debt reflected by the note of August 5, 1987. On or about August 28, 1987, at the request of the respondent, the client executed a confession of judgment prepared by the respondent, confessing judgment in the respondent's favor against her in the amount of $14,500.00 based upon the promissory note. On or about August 31, 1967, the respondent filed the aforesaid confession of judgment in the office of the Nassau County Clerk.

In obtaining the confession of judgment from his client, the respondent failed to first provide her with a complete and full explanation of the character, effect, and purpose of the confession of judgment, including its effect upon her credit standing. The amount of the confession of judgment is not commensurate with, and in fact clearly exceeds, the value of the legal services that the respondent had rendered to his client as of August 5, 1987. The respondent wrongfully filed the confession of judgment to effect payment rather than holding it as' security for payment of his outstanding legal fees.

Charge Three alleges that the respondent improperly attempted to limit his liability to a client for his possible malpractice. The confession of judgment drafted by the respondent and signed by his client on August 28, 1987, states in part: "I am further releasing Mr. Jacobs from any liability that may ensue as a result of the action he is taking on any behalf." The respondent improperly obtained this release while his representation of his client was ongoing. The respondent improperly obtained the aforementioned release from his client without first fully apprising

respondent improperly obtained the release from his client without first advising her to secure independent counsel.

Charge Four alleges that the respondent has charged a client a clearly excessive fee, in violation of DR 2-106 of the Code of Professional Responsibility. On or about August 18, 1988, the respondent charged his client the sum of $10,000 for legal services allegedly performed by him in connection with her matrimonial matter between August 28, 1987, and August 19, 1988. The respondent actually performed no more than 43 hours of legal services on his client's matrimonial matter between August 28, 1987, and August 19, 1988, to which he was entitled to charge no more than the sum of $6,450 in accordance with the retainer agreement dated March 27, 1987.

Charge Five alleges that the respondent improperly obtained a confession of judgment for legal fees from his client. On or about August 18, 1988, at the request of the respondent, the client signed a promissory note prepared by the respondent, evidencing a debt owed to the respondent in the amount of $10,000. On or about August 18, 1988 at the request of the respondent, the client executed an acknowledgment before a notary public acknowledging the debt reflected in the promissory note of August 18, 1988. On or about August 18, 1988, at the request of the respondent, the client executed a confession of judgment prepared by the respondent, confession judgment in the respondent's favor against her in the amount of $10,000. On or about September 15, 1988, the respondent filed the confession of judgment in the office of the County Clerk, Nassau County.

In obtaining the confession of judgment from his client, the respondent failed to first provide her with a complete and full explanation of the character, effect, and purpose of the confession of judgment, including its effect upon her credit rating. The amount of the confession of judgment is not commensurate with, and in fact clearly exceeds, the value of the legal services that the respondent had rendered to the client as of August 18, 1988. The respondent

clearly exceeds, the value of the legal services that the respondent had rendered to the client as of August 18, 1988. The respondent wrongfully filed the confession of judgment to effect payment rather than holding it as security for payment of his outstanding legal fees.

The Special Referee sustained the five charges of misconduct. The petitioner moves (1) to confirm the report of the Special Referee, and (2) to compel the respondent to take the necessary, and appropriate action to vacate the judgments obtained by confessions of judgment from his client. The respondent cross-moves to (1) disaffirm the report of the Special Referee, (2) deny the petitioner's motion to confirm the Special Referee's findings, (3) dismiss the charges against the respondent, (4) refer the matter to the arbitration panel located in Nassau County to arbitrate the fee dispute between the respondent and his client, or, (5) direct the Justice assigned to the complainant's matrimonial case at the Supreme Court, Nassau County, to conduct a hearing to determine the attorneys' fee the respondent is entitled to in the underlying divorce action and Family Court proceedings, and (6) stay the enforcement of any discipline penalty that may be determined by this Court pending: the resolution of any final appeal, together with such other or further relief as this Court deems just and proper.

After a review; of the evidence, we find that Charges One through Five were properly sustained by the special Referee. We find the respondent's fees in both Charge One and Charge Four to be excessive and unsupported by the evidence. We further find with respect to Charge Three that the respondent improperly attempted to limit his liability to his client. With respect to Charges two and Five, we find that the respondent improperly obtained and filed confessions of judgment. The respondent failed to provide his client with a complete and full explanation of the character, effect, and purpose of the confession of judgment. Further, the amount of the confession of judgment exceeds the value of the respondent's services.

Accordingly, the petitioner's motion is granted in its entirety and the respondent is directed to vacate the judgments entered

In determining an appropriate measure of discipline to be imposed, we have taken into consideration the respondent's record of prior discipline, including 1986 Letter of Reprimand, a 1986 Letter of Caution, and a 1990 Letter of Admonition.
Accordingly, the respondent is suspended from the practice of law for a period of three years.

MANGANO, P. J., THOMPSON, BRACKEN, SULLIVAN and MILLER, JJ., concur.

Ordered that the petitioner's motion to confirm is granted in its entirety; and it is further,

Ordered that the respondent's motion to disaffirm is denied in its entirety; and it is further,

Ordered that the respondent David Barnett Jacobs, is suspended from the practice of law for a period of three years, commencing April 12, 1993, and continuing until the further order of this Court, with leave to the respondent to apply for reinstatement no sooner than six months prior to the expiration of that period of three years upon furnishing satisfactory proof (a) that during the said period he refrained from practicing or attempting to practice law, (b) that he has fully complied with this order and with the terms and provisions of the written rules governing the conduct of disbarred, suspended and resigned attorneys (22 NYCRR 691.10), and (c) that he has otherwise properly conducted himself; and it is further,

Ordered that pursuant to Judiciary Law § 90, during the period of suspension and until the further order of this Court, the respondent David Barnett Jacobs is commanded to desist and refrain (1) from practicing law in any form, either as principal or agent, clerk or employee of another, (2) from appearing as an attorney or counselor-at-law before any court, Judge, Justice, Board, commission, or other public authority, (3) from giving to another an

agent, clerk or employee of another, (2) from appearing as an attorney or counselor-at-law before any court, Judge, Justice, opinion as to the law or its application or any advice in relation thereto, and (4) from holding himself out in any way as an attorney and counselor-atlas; and it is further,

Ordered that the respondent is directed to vacate the judgments entered against his client.

GUY JAMES MANGANO, P.J.
WILLIAM C. THOMPSON
LAWRENCE J. BRACKEN
RICHARD A. BROWN
SONDRA MILLER, JJ.

90-06574

In the Matter of David Barnett Jacobs, an attorney and counselor at law.

DECISION & ORDER ON MOTION

Grievance Committee for the Tenth Judicial District, petitioner;

David Barnett Jacobs, respondent.

Motion by the respondent for reargument of this court's opinion and order, dated March 8, 1993, suspending him from the practice of law for a period of three years and directing him to vacate the judgments entered against his client, or, in the alternative, for leave to appeal to the Court of Appeals. The respondent was admitted to the practice of law by this court on June 20, 1979.

Upon the papers filed in support of the motion and the papers filed in opposition thereto, it is

ORDERED that the motion is denied.

MANGANO, PJ., THOMPSON, BRACKEN, SULLIVAN and MILLER, JJ., concur.

STATE OF NEW YORK
COURT OF APPEALS

At a session of the Court, held at the Court of Appeals Hall in the City of Albany on the ninth day of July 1993

Present, HON. JUDITH S. KAYE Chief Judge, presiding.

Mo. No. 394

In the Matter of David Barnett Jacobs,
an attorney and counselor-at-law.
Grievance Committee for the Tenth Judicial District,
Respondent,

David Barnett Jacobs,
Appellant.

A motion for leave to appeal to the Court of Appeals &c. In the above cause having heretofore been made upon the part of the appellant herein and papers having been submitted thereon and due deliberation having been thereupon had, It. is

ORDERED, on the Court's own motion, that the appeal be and the same hereby is dismissed, without costs, upon the ground that no substantial constitutional question is directly involved; and It. is

ORDERED, that the said motion for leave to appeal &c. be and the same hereby is denied.

SUPREME COURT OF THE STATE OF NEW YORK
APPELLATE DIVISION SECOND JUDICIAL DEPARTMENT

(NOT TO BE PUBLISHED)

GUY JAMES MANGANO, P.J.
WILLIAM C. THOMPSON
LAWRENCE J. BRACKEN
RICHARD A. BROWN
SONDRA MILLER, JJ.

90-06574

In the Matter of David Barnett Jacobs, an attorney and counselor at law.

DECISION & ORDER

Grievance Committee for the Tenth Judicial District, petitioner;

David Barnett Jacobs, respondent.

Proceeding pursuant to statute (Judiciary Law § 90) to discipline the respondent, David Barnett Jacobs, an attorney and counselor-at-law, who was admitted to practice by to practice by the Appellate Division of the Supreme Court, Second Judicial Department, on June 20, 1979.

The respondent filed a cross-petition and verified answer to petition" requesting an order (a) vacating the authorization for the disciplinary proceeding set forth in this Court 's order of July 17, 1990, (b) referring this matter to the arbitration panel of the Nassau County Bar Association to arbitrate the fee dispute in question; or in the alternative, (c) directing that the Justice assigned to the matrimonial case in question conduct a hearing to confirm the attorney's fees, and

(d) staying the disciplinary proceeding pending the proposed hearing in the Supreme Court, Nassau County.

Upon the papers filed in support of the application to discipline, the answer thereto, and upon the cross petition and the papers filed in opposition thereto, it is

ORDERED that the issues raised by this petition and the respondent's answer are referred to Hon. Max H. Galfunt. a former Criminal Court Judge, 216 Beach 143rd Street, Neponsit, New York 11694, as Special Referee to hear and to report, together with his findings on the issues; and it is further

ORDERED that the respondent's cross petition is denied.

MANGANO, PJ., THOMPSON, BRACKEN, BROWN and MILLER, JJ., concur

SUPREME COURT OF THE STATE OF NEW YORK
APPELLATE DIVISION SECOND JUDICIAL DEPARTMENT

(NOT TO BE PUBLISHED)

GUY JAMES MANGANO, P.J.
WILLIAM C. THOMPSON
LAWRENCE J. BRACKEN
JOSEPH J. KUNZEMAN
THOMAS R, SULLIVAN, JJ.

90-06574

In the Matter of David Barnett Jacobs, an attorney and counselor at law.

DECISION & ORDER ON MOTION

Grievance Committee for the Tenth Judicial District, petitioner;

David Barnett Jacobs, respondent.

Petitioner Grievance Committee for the Tenth Judicial District moved for a proceeding pursuant to statute (Judiciary §90) to discipline the respondent, David Barnett Jacobs, an attorney. who was admitted to practice by the Appellate Division of the Supreme Court, Second Judicial Department on June 20, 1979. By decision and order of this court dated May 10, 1991, this matter was referred to Hon. Max H. Galfunt, as Special Referee to hear and report, together with his findings on the issues. By decision and order dated May 21, 1991, Hon. Max H. Galfunt was relieved as Special Referee and the matter was referred to Hon. Moses M. Weinstein, a retired Associate Justice of the Appellate Division, Second Judicial Department, c/o Weinstein & Weinstein, 123-35A 82nd Road, Kew Gardens, NY 11415, as Special Referee.

Respondent now moves for an order permitting him to (1) conduct an examination before trial of the complainant, Patricia Warmhold; (2) to obtain a bill of particulars from the complainant, Patricia Warmhold; (3) to obtain complete disclosure of all relevant and material information in the possession of the complainant and/or
Grievance Committee for the Tenth Judicial District; and (4) for an order directing that all further proceedings be stayed pending a the determination of the instant motion, and if granted, for a stay pending completion of discovery.

Upon the papers filed in support of the motion and the papers filed in opposition thereto, it is

ORDERED that the motion is denied in its entirety.

MANGANO, PJ., THOMPSON, KUNZEMN and SULLIVAN, JJ., concur.

Enter
Martin H. Brownstein
Clerk

SUPREME COURT OF THE STATE OF NEW YORK
APPELLATE DIVISION SECOND JUDICIAL DEPARTMENT

(NOT TO BE PUBLISHED)

GUY JAMES MANGANO, P.J.
WILLIAM C. THOMPSON
LAWRENCE J. BRACKEN
THOMAS R, SULLIVAN.
SONDRA MILLER, JJ.
90-06574

In the Matter of David Barnett Jacobs, an attorney and counselor at law.

DECISION & ORDER ON MOTION

Grievance Committee for the Tenth Judicial District, petitioner;

David Barnett Jacobs, respondent.

By decision and order of this court dated July 17, 1990, the petitioner was authorized to institute an(l prosecute a disciplinary proceeding against the respondent. By further order dated May 10, 1991, the respondent's cross-motion to vacate the authorization was denied and the issues were referred to the Hon. Max Galfunt, as Special Referee to hear and report. By order of May 21, 1991, the Hon. Moses M. Weinstein was appointed as Special Referee (relieving the Hon. Max Galfunt). the hearing was closed on November 14, 1991. The respondent now moves for an order: (I) holding in contempt Dominick Pelle, Esq., the attorney who represented the husband in the matrimonial action from which the charges of misconduct against the respondent emanated; (2) reopening the disciplinary proceeding against the respondent to receive evidence related to the subpoenaed information; (3) directing Dominick Pelle, Esq. to appear with the relevant records at the office

of the Grievance Committee pursuant to the subpoenas duly served upon him for the purpose of giving evidence in the disciplinary proceeding against the respondent; and (4) staying all proceedings pending receipt of the proposed information. The respondent was admitted to the practice of law by the Appellate Division of the Supreme Court, Second Judicial Department on June 20, 1979.

Upon the papers filed in support of the motion and the papers filed in opposition thereto, it is

ORDERED that the motion is denied.

MANGANO, PJ., THOMPSON, BRACKEN, SULLIVAN and MILLER, JJ., concur.

SUPREME COURT OF THE STATE OF NEW YORK
APPELLATE DIV1SION SECOND JUDICIAL DEPARTMENT

(NOT TO BE PUBLISHED)

GUY JAMES MANGANO, P.J.
William C. THOMPSON
LAWRENCE J. BRACKEN
RICHARD A. BROWN
SONDRA MILLER, JJ.
90-06574

In the Matter of David Barnett Jacobs, an attorney and counselor at law.

DECISION & ORDER ON APPLICATION

Grievance Committee for the Tenth Judicial District, petitioner;

David Barnett Jacobs, respondent.

Application by the Grievance Committee for the Tenth Judicial District pursuant to statute Judiciary Law, § 90[7]) for leave to institute and prosecute a disciplinary proceeding in this Court as petitioner against David Barnett Jacobs, an attorney, who was admitted to practice by the Appellate Division, Second Judicial Department on June 20, 1979, for acts of professional misconduct alleged in the committee's report, dated February 16,1990.

ORDERED that the application is granted; and it is further,

ORDERED that the Grievance Committee for the Tenth Judicial District is hereby authorized to institute and prosecute a disciplinary proceeding h this court, as petitioner, against the said David Barnett Jacobs based on the acts of professional misconduct set forth in the said committee's report; and it is further,

ORDERED that Frank A. Finnerty, Jr., Chief Counsel to the Grievance Committee for the Tenth Judicial District, 900 Ellison Avenue, Suite 304, Westbury, New York 11590, is hereby appointed as attorney for the petitioner in such proceeding.

MANGANO. PJ.. THOMPSON, BRACKEN, BROWN and MILLER, JJ., concur.

July 17, 1990

MATTER OF JACOBS, DAVID BARNETT

CONSTITUTIONAL, STATUTORY, AND RULE PROVISIONS

FIFTH AMENDMENT TO THE U.S. CONSTITUTION:

...nor shall any person...be deprived of life, liberty, or property, without due process of law...

SIXTH AMENDMENT TO THE U.S. CONSTITUTION

In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defense.

EIGHTH AMENDMENT TO THE U.S. CONSTITUTION

Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishment inflicted.

FOURTEENTH AMENDMENT TO THE U.S. CONSTITUTION:

Section 1....No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law, nor deny to any person within its jurisdiction the equal protection of the laws.

THE CONSTITUTION OF THE STATE OF NEW YORK

ARTICLE 1, 1:

No member of this state shall be...deprived of any of the rights or privileges secured to any citizen thereof, unless by the law of the land, or the judgment of his peers...

ARTICLE 1, 6:

...No person shall be deprived of life, liberty or property without due process of law.

ARTICLE 1, 11

No person shall be denied the equal protection of the laws of this state or any subdivision thereof.

ARTICLE VI. 3(7):

No appeal shall be taken to the court of appeals from a judgment or order entered upon the decision of an appellate division of the supreme court in any civil case or proceeding or order entered in an appeal from another court including an appellate or special term of the supreme court unless the construction of the constitution of the state or of the United States is directly involved therein, or unless the appellate division of the supreme court shall certify that in its opinion a question of law is involved which ought to be reviewed by the court of appeals.

TITLE 28, U.S.C. § 2283:
A Court of the United States may not grant an injunction to stay a proceeding in a State Court, except as expressly authorized by

Congress, or where necessary to aid in its jurisdiction or to protect or effectuate its judgments.

NEW YORK STATUTES

Judiciary Law § 90

2. The supreme court shall have power and control over attorneys and counselors-at-law and all persons practicing or assuming to practice law, and the appellate division of the supreme court in each department is authorized to censure, suspend from practice or remove from office any attorney and counselor-at-law admitted to practice who is guilty of professional misconduct, malpractice, fraud, deceit, crime or misdemeanor, or any conduct prejudicial to the administration of justice; and the appellate division of the supreme court is hereby authorized to revoke such admission for any misrepresentation or suppression of any information in connection with the application for admission to practice.

It shall be the duty of the appellate division to insert in each order of suspension or removal hereafter rendered a provision which shall command the attorney and counselor-at-law thereafter to desist and refrain from the practice of law in any form, either as principal or as agent, clerk or employee of another...
...In the case of suspension only, the order may limit the command to the period of time within which such suspension shall continue, and if justice so requires may further limit the scope thereof.

6. Before an attorney or counselor-at-law is suspended or removed as prescribed in this section, a copy of the charges against him must be delivered to him personally within or without the state or, in case it is established to the satisfaction of the presiding justice of the appellate division of the supreme court to which the charges have been presented, that he cannot with due diligence be served personally, the same may be served upon him by mail, publication or

or otherwise as the said presiding justice may direct, and he must be allowed an opportunity of being heard in his defense....

8. Any petitioner or respondent in a disciplinary proceeding against an attorney or counselor-at-law under this section, including a bar association or any other corporation or association, shall have the right to appeal to the court of appeals from a final order of any appellate division in such proceeding upon questions of law involved therein.